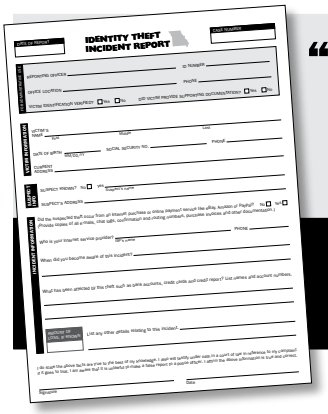
FRONT LINE Report

March 2008 OFFICE OF MISSOURI ATTORNEY GENERAL Vol. 15, No. 1

New online form helps law enforcement help victims of ID theft

Victims of identity theft often face a frustrating and time-consuming process when trying to clear their name and repair their credit history. Attorney General Jay Nixon, whose office has a role in mediating consumer ID theft cases, is making it easier for law enforcement to expedite the process for citizens through a new feature on his Web site, the Identity Theft Incident Report.

The form, which can be found at ago.mo.gov, is for law enforcement to fill out and submit to the Attorney General's Office when a consumer files an ID theft complaint with them. The information on the form can then be used by the AG's Office when mediating an identity theft claim between a consumer and a business.


IDENTITY THEFT INCIDENT REPORT

"When a victim attempts to have charges on a credit card that were run up by the identity thief removed by a business, the victim needs a police report and affidavit to substantiate the fact that they were indeed the victim of this crime," Nixon said. "We hope that having this convenient form on our Web site for law enforcement to access and send to us will expedite the process."

> "We hope that having this convenient form on our Web site for law enforcement to access and send to us will expedite the process."
>
> — **Attorney General Jay Nixon**

A copy of the Identify Theft Incident Report can be found on **page 5**. It can be downloaded at **ago.mo.gov**

Law enforcement bills heading through state chambers

PRESCRIPTION DRUG MONITORING

HB 1619 and SB 732 would both establish, subject to appropriation, a monitoring program in the Department of Health and Senior Services for all controlled substances on Schedules II-V. Each bill also would tighten the requirements for those buying Sudafed products from a pharmacist.

Status: HB 1619 has passed the House; SB 732 has passed the Senate.

ALCOHOL-RELATED CRIMES

SBs 747 & 736 would:

- Allow a peace officer who has probable cause to believe that a minor is intoxicated to request that the minor take a blood alcohol test. A minor who refuses the test shall be deemed "visibly intoxicated" and can be charged as a minor in possession.
- Prohibit a person from possessing or using an alcoholic beverage vaporizer.
- Allow municipal court DWIs to be treated just like other DWIs for purposes of enhanced penalties for repeat offenders.

Status: Bill has passed the Senate and awaits House action.

INTERNET STALKING, HARASSMENT

SBs 818 & 795 would:

- Expand definition of harassment to include communications intended to frighten or disturb another person.
- Enhance penalty for harassment to a class D felony in some cases.
- Expand definition of stalking if the act is targeted at the individual or his family.

Status: Bill passed by the Senate; awaits action in the House.

U.S. Supreme Court to hear car search case

The U.S. Supreme Court has agreed to review a "search incident to arrest" case recently handed down by the Arizona Supreme Court that dramatically changes the law that allows a car's interior to be searched without a warrant.

The Arizona court held that once a suspect who is traveling in the car is handcuffed and placed in the control of police officers, a search incident to arrest of the car's interior is no longer justified.

Missouri law still allows officers to make a search incident to arrest that includes a car's interior, even if the suspect is under police control.

What do you do? Keep following constitutional guidelines

Police officers should continue to follow the constitutional guidelines they are trained to use in conducting searches incident to arrest while the Arizona case is heard by the Supreme Court.

Under a long-recognized exception to the search warrant requirement, officers can search a suspect. If the underlying arrest is lawful, police are not required to provide particular probable cause or suspicion that particular evidence or weapons will be discovered.

This search incident to arrest extends to the entire interior of a car if the person arrested was traveling in the car. In fact, in 2004 the U.S. Supreme Court reaffirmed that this search includes a car's interior, even if the suspect had already left the vehicle before police made contact.

Officer's estimate of speed sufficient for conviction

In *State v. Kimes*, the Missouri Court of Appeals held that the testimony of an experienced police officer – standing alone – could be sufficient evidence to convict a motorist of speeding.

State v. Kimes
No. 28138
Mo.App., SD.,
Aug. 15, 2007

A trial court found Joshua Kimes guilty of speeding based solely on the testimony of an officer.

The officer testified that he estimated Kimes was traveling 35 mph in a 20 mph zone. The officer had no radar, nor had he paced Kimes.

The appellate court held that "while an experienced officer cannot testify as to the exact speed of a vehicle with precise accuracy, it does not mean that such testimony should be ignored in all cases."

As an example, the court stated that an officer's estimate that a vehicle was traveling 60 mph in a 55 mph zone would not be sufficient. But when the variance between estimated speed and the speed limit increases, that can constitute proof beyond a reasonable doubt.

One factor is, of course, the experience in speed detection that an officer brings into court.

2007 Top 10 complaints, inquiries to AG's Office

1. Financing, credit, debt collection, fraud: 5,324
2. Auto sales, leasing, repair, odometer, title, towing: 2,375
3. Gas prices, storm-related price gouging: 2,102
4. Telephone slamming, cramming, billing: 1,980
5. Home construction, repair, remodeling: 1,624
6. Lotteries, sweepstakes: 1,505
7. Identity theft: 1,296
8. Travel clubs, timeshares, travel-related promotions: 1,108
9. Computers, online services, auctions: 1,018
10. Charitable organizations: 822

ID Theft Hotline
800-392-8222

Nixon has set up a hotline to help Missourians recognize and report identity theft. He also has a complaint form online at **ago.mo.gov** for victims to report theft.

Front Line Report is published periodically by the Missouri Attorney General's Office. It is distributed to law enforcement throughout the state. Find issues at ago.mo.gov/lawenforcement.htm

● **Attorney General:** Jeremiah W. (Jay) Nixon

● **Editor:** Ted Bruce, Deputy Chief Counsel for the Public Safety Division

● **Production:** Peggy Davis, publications editor, Attorney General's Office
P.O. Box 899, Jefferson City, MO 65102

ARMED CRIMINAL ACTION, DANGEROUS INSTRUMENTS

State v. Baumann
No. 27713 & 27712
Mo.App., S.D., March 28, 2007

The defendant used a knife to slash tires, and, besides tampering with a vehicle, he was convicted of armed criminal action. The ACA was based on the defendant's use of a "dangerous instrument" to tamper with the vehicle. But since the defendant's use of a knife under those circumstances could not kill or seriously injure a person, the knife was not a dangerous instrument.

If the defendant had been charged with using a deadly weapon, the case might have turned out differently. Whether an item is a deadly weapon does not turn on whether "under the circumstances in which it is used, [it] is readily capable of causing death or other serious physical injury." See Section 556.061.(9)-(10).

CHILD ABUSE

State v. Still
No. 27254, Mo.App., S.D., March 16, 2007

Still, who was charged with two counts of child abuse, argued the evidence was insufficient to prove that he knowingly inflicted cruel and inhuman punishment on the two victims. The court found the evidence was sufficient since Still admitted he hit the children on their buttocks once with his hands and four or five times with a paddle; acknowledged he spanked them too hard and should not have done it; and the beatings left a handprint on one child, and paddle prints and visible bruises on both children.

There was also sufficient evidence that Still acted knowingly where he admitted he spanked the children too hard; he should not have done it; he tried to hide what he did; and the blows left marks.

STATUTORY SODOMY

Soto v. State
No. 88203, Mo. banc, June 26, 2007

The court held that penetration is not an element of first-degree statutory sodomy.

UPDATE: CASE LAW

Opinions can be found at www.findlaw.com/casecode/index.html

State v. Herndon
No. 66610, Mo.App., W.D., March 27, 2007

Herndon was charged with first-degree statutory sodomy for placing his penis on the victim's vagina, although evidence showed the defendant penetrated the victim's vagina. The court found insufficient evidence of statutory sodomy because placing the penis on the vagina without penetration does not meet the definition of deviate sexual intercourse.

CHILD MOLESTATION

State v. Patton
No. 27792, Mo.App., S.D., July 30, 2007

The defendant was charged with first-degree child molestation for touching the victim's vagina. The charging document did not specify whether the touching was under or through the clothing. Trial evidence showed the defendant touched the victim's vagina through her clothing.

On appeal, the defendant claimed the evidence was insufficient because he had been charged with touching the victim's vagina (not through the clothing). The court disagreed, holding that, under the statute, any touching of the vagina (with the culpable mental state) constituted impermissible sexual contact.

DWI, SUFFICIENT EVIDENCE

State v. Byron
No. 66807, Mo.App., W.D., May 22, 2007

The appeals court found insufficient evidence of DWI. Byron's vehicle was found at an accident scene. Byron was contacted at home within about an hour after the accident was observed, and he was drunk. But since Byron could have gotten drunk after the accident (there was no evidence, the court stated, that Byron "did not obtain alcohol at the Food 4 Less and consume it in the relevant time interval"), the court concluded that the evidence of DWI was insufficient.

State v. Aaron Davis
No. 66397, Mo.App., W.D., March 27, 2007

A witness found a vehicle crashed into a light pole with no one around. A woman said the car's occupants had gone to a nearby address.

Aaron Davis, who admitted crashing into the pole, smelled of alcohol and displayed other signs of intoxication. Saying he had not drunk anything since the crash, Davis refused a breath test. Police found beer cans in the car and under the driver's seat.

The court found insufficient evidence of DWI, saying there was no competent evidence of when the accident occurred or when Davis drank beer. The court said it takes time for alcohol to be absorbed into the blood; thus, if Davis drank several beers immediately before he crashed, he might not have been intoxicated.

State v. Gary Davis
No. 66895, Mo.App., W.D., July 3, 2007

The appeals court found sufficient evidence of DWI. Gary Davis drove through his neighbor's yard, damaging property. Two hours later, he drove by again and the neighbor called the police.

When police responded, they saw a car parked in front of Davis' home, with a cold, empty beer can nearby. The car's hood was warm. An officer spoke to Davis, who smelled of alcohol and had poor balance, bloodshot eyes and slurred speech. There was sufficient evidence that Davis was intoxicated while driving: The officer observed Davis in an intoxicated state a mere 10 to 15 minutes after the neighbor saw Davis driving.

State v. Hoy
No. 27677, Mo.App., S.D., April 19, 2007

This case examines at length whether there was sufficient evidence of intoxication due to drugs rather than alcohol. The court found the evidence sufficient, observing that an expert had testified as to the effect of sleeping medication found in the defendant's system, and that his driving was erratic and he appeared drunk or drugged.

MANUFACTURING CONTROLLED SUBSTANCE, SUFFICIENCY, METH

State v. Lowrey

No. 27610, Mo.App., S.D., April 24, 2007

Lowrey was found guilty of trying to manufacture meth. He was found hiding in an appliance shop during the off-hours, and an operational meth lab was found. Ether could be smelled 20-30 feet outside the building. When officers entered the shop, they found, in a non-public part of the store, a meth lab setup with a lit flame and syringes containing meth. Lowrey was hiding in an attached garage.

PLAIN FEEL DOCTRINE

State v. Kelley

No. 28248, Mo.App., S.D., June 26, 2007

During a frisk for weapons, the officer felt a cylinder in the defendant's pocket, but did not immediately recognize it. And since the officer did not immediately recognize the object as a weapon or contraband, it could not be seized and searched under the "plain feel" doctrine.

RESISTING ARREST

State v. Redifer

No. 65665, Mo.App., W.D., Dec. 26, 2006

Redifer had an outstanding warrant for his arrest for failure to appear on charges of DWI and DWR, for which he already had been convicted and sentenced. When Moberly police went to arrest him on the warrant, Redifer fought with them and was charged with felony resisting arrest.

The charging document alleged the officers were arresting Redifer for DWI. It later was amended, stating officers were arresting Redifer for a "warrant for defendant's failure to appear on the felony charge of driving while intoxicated."

The appeals court found the evidence insufficient because the state failed to prove Redifer was being arrested for a crime, infraction or ordinance violation. While "failure to appear" can be a crime, the state failed to prove Redifer failed to appear on bond as ordered and he willfully failed to appear before any court or judicial officer.

An application for transfer is pending.

UPDATE: CASE LAW

CRAWFORD V. WASHINGTON, HEARSAY, 911 CALLS

State v. Bennett

No. 27464, Mo.App., S.D., April 9, 2007

Buddy Bennett and two accomplices broke into an apartment to rob it. During the robbery, the occupants' oldest son slipped out and called 911 from another apartment. The court ruled the calls were admissible as excited utterances as they were made while under stress from a startling event — armed robbers assaulting and stealing from his family. Nor did these statements violate Bennett's confrontation rights under *Crawford*. The statements were clearly made to get police assistance during an emergency.

CRAWFORD V. WASHINGTON, BUSINESS RECORDS, LAB REPORTS

State v. March

No. 87902, Mo. banc, March 20, 2007

Robert March was convicted of second-degree drug trafficking. The lab analyst who had tested the drugs had moved to North Carolina prior to trial, so the state presented the custodian of the lab records to testify. March objected to the lab report, asserting it was testimonial hearsay and he did not have the chance to confront and question the analyst.

The Missouri Supreme Court found that admitting the lab report regarding the weight and identification of the drugs, without testimony of the forensic analyst who tested the drugs, violated the Confrontation Clause under *Crawford*.

The court found that the lab report constituted a "core" testimonial statement because it was offered to prove an element of the charged crime and the report was a sworn and formal statement offered in lieu of the analyst's testimony.

The report was created at the request of law enforcement for prosecution purposes. Thus, the report was testimonial and could not be admitted without the preparer's testimony unless the preparer was unavailable and there was a prior opportunity to cross-examine.

CRAWFORD V. WASHINGTON, OPPORTUNITY TO CROSS-EXAMINE

State v. Tanner

No. 27656, Mo.App., S.D., April 27, 2007

A sodomy victim's out-of-court statements were properly admitted because the 5-year-old testified at trial. The defense argued that while the child appeared at trial, she really didn't "testify" because she didn't give evidence establishing or proving facts. The victim testified about her name, age and her defendant-father's name. She indicated she never lied about her father. She said she did not know where the things she said appellant did to her occurred. The court found this was sufficient testimony for the purpose of 491.075, and thus her videotaped statement was admissible.

State v. Howell

No. 27822, Mo.App., S.D., June 19, 2007

Admission of a child's videotaped statement did not violate the defendant's right to confrontation, because the child testified at trial. This opportunity to cross-examine was sufficient despite the child's inability to recall the videotape or certain details of the offense.

POSSESSION OF CONTROLLED SUBSTANCE, KNOWLEDGE

State v. Cushshon,

No. 87764, Mo.App., E.D., April 3, 2007

The defendant was convicted of possession of a controlled substance in a correctional facility after marijuana was found in his mattress. But since there was joint access to the premises, and since the state presented no evidence that the defendant knew the marijuana was present, the conviction was reversed.

STEALING

State v. Langston

No. 27900, Mo.App., S.D., July 26, 2007

The verdict director at trial was incorrect because it required the jury to find that the property had a value of at least $500, but at the time of the crime, the felony stealing statute required the property to have a value of at least $750.

DATE OF REPORT

IDENTITY THEFT INCIDENT REPORT

CASE NUMBER

FOR ADMINISTRATIVE USE

REPORTING OFFICER _____ ID NUMBER _____

OFFICE LOCATION _____ PHONE _____

VICTIM IDENTIFICATION VERIFIED? ☐ Yes ☐ No DID VICTIM PROVIDE SUPPORTING DOCUMENTATION? ☐ Yes ☐ No

VICTIM INFORMATION

VICTIM'S NAME _____
First Middle Last

DATE OF BIRTH _____ (MM/DD/YY) SOCIAL SECURITY NO. _____ PHONE _____

CURRENT ADDRESS _____

SUSPECT INFO

SUSPECT KNOWN? No ☐ Yes _____
Suspect's name

SUSPECT'S ADDRESS _____

INCIDENT INFORMATION

Did the suspected theft occur from an Internet purchase or online payment service like eBay, Amazon or PayPal? No ☐ Yes ☐
(Provide copies of all e-mails, chat logs, confirmation and routing numbers, purchase invoices and other documentation.)

Who is your Internet service provider? _____ PHONE _____
ISP's name

When did you become aware of this incident? _____

_____

What has been affected by this theft such as bank accounts, credit cards and credit report? List names and account numbers.

_____

_____

AMOUNT OF LOSS, IF KNOWN

List any other details relating to this incident. _____

_____

I do state the above facts are true to the best of my knowledge. I also will testify under oath in a court of law in reference to my complaint if it goes to trial. I am aware that it is unlawful to make a false report to a police officer. I affirm the above information is true and correct.

_____ _____
Signature Date

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL
PO BOX 899
JEFFERSON CITY, MO 65102

St. Louis jury finds police officer liable for arrest of firefighter

A recent federal jury trial in St. Louis reinforces that no particular agency or individual is "in charge" when responding to an emergency.

Wilson v. City of Hazelwood and Todd Greeves
Feb. 13, 2008
U.S. District Court, Eastern District

On Feb. 13, jurors found a police officer liable for arresting a fire captain who had refused to move his fire truck during a car crash rescue. The officer was ordered to pay $17,500 in damages to the captain.

Both police and firefighters responded to an accident scene on Interstate 270 in 2003. The fire captain parked the fire truck to protect rescue workers freeing a victim. The police officer ordered the captain to move the truck so traffic could pass.

When the fire captain ignored the order, the officer arrested and held him for 23 minutes.

While not resolving the question of who is in charge, the case suggests that police officers should not automatically assume that they are in charge of an accident scene.

This question has been debated for years among responding agencies — police, firemen and ambulance personnel — as well as what needs take priority over others.

Previous attempts in the General Assembly to pass legislation to designate who is in charge have failed.

Cooperation encouraged

Many times each day multiple agencies respond to emergencies and, in most situations, work well together. This cooperation is not only preferable, but also necessary because neither the courts nor the legislature have pronounced any one agency in charge or in control of such emergencies.

Canada major source of Ecstasy

While Canada often is not thought of as a source of illegal drugs imported into the United States, federal officials confirm that Canada is a significant supplier of Ecstasy, or MDMA.

The Royal Canadian Mounted Police estimates that illegal labs in Canada produce 2 million tablets per week. The number of seizures by American authorities along the northern U.S. border has increased significantly over the last few years.

To make matters worse, since Ecstasy and meth have a similar chemical structure, with similar stimulant effects, the drug manufacturers are making tablets containing a combination of the two. This means that many Ecstasy users unwittingly will be using a combination containing meth, and meth users will be attracted to Canadian Ecstasy knowing they often contain meth.